FILED
JUL 16 1991

(Submitted with the consent of the Parties)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et. al.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS AMICUS CURIAE

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October Term, 1973

No. 73-1004

SOUTHEASTERN PROMOTIONS, LTD.,

Petitioner,

v.

STEVE CONRAD, et al.,

Respondent.

BRIEF OF THE AUTHORS LEAGUE OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of The Authors League

The Authors League is a national society of professional writers and dramatists. Its members, including the authors of the Musical, HAIR, write the plays and musical comedies which are produced on the New York stage and in major theatres throughout the United States. One of the League's principal purposes is to express the views of its members in cases involving freedom of speech and press, and the freedom of audiences to see plays. The decisions below drastically curtail these freedoms and restrict the rights of dramatists, producers and audiences. Because these decisions pose a grave danger to freedom of speech in the American theatre, the Authors League respectfully submits this brief.

ARGUMENT

Taken as a Whole, HAIR Cannot be Judged Obscene under the Miller v. California Standard.

(i) The District Court recognized that the Chattanooga Municipal Auditorium had banned the presentation of HAIR because its Board thought the musical was obscene. The Court also recognized that if HAIR was not obscene, the banning would violate the Petitioner's First Amendment rights.

As several Federal Courts have ruled, HAIR is not obscene. Taken as a whole: it does not appeal to prurient interest in sex; or portray sexual conduct in a patently offensive way, or lack serious literary and artistic value. Since, taken as a whole, it satisfies any one of the three-part *Miller* v. *California* tests, it is not obscene—and its banning by the Chattanooga Auditorium board must be reversed. (*Miller* v. *California*, 413 U.S. 15)

The courts below sought to side-step this inevitable conclusion of non-obscenity by attempting to separate "conduct" (i.e., the action on the stage) from "speech" (i.e., the words spoken by the actors). Selecting certain pieces of action and stage business, the courts decided that this "conduct" was neither "symbolic speech" nor so closely related to speech as to be illustrative thereof. They concluded that such conduct is not protected by the First Amendment, and can be judged standing alone, rather than as part of the *whole* of the dramatic work. Having wrenched these actions from the context of the play, the Courts ruled they were obscene. Implicit in both opinions is the recognition that if the musical were judged as a whole under the *Miller* standard, it would have to be judged not obscene.

The "conduct" in a play cannot be separated from its dialogue and relegated to a lower standing. On the stage, action is a primary means of communicating the playwright's ideas, emotions, characterization and development of the plot. Legally and aesthetically, a play's "conduct" is as much "expression" as its dialogue; and pieces of the conduct are no more susceptible than passages of dialogue of being excised from the play and judged separately.

The function of "conduct" as the primary means of dramatic expression was described by Judge Learned Hand in *Sheldon* v. *Metro-Goldwyn Pictures Corporation, et al.*, the classic copyright infringement suit involving the stage play DISHONORED LADY. 81 F. 2d 49 (2d Cir. 1936); cert. denied 298 U.S. 669. Judge Hand said:

> "We have often decided that a play may be pirated without using the dialogue. . . . Were it not so, there could be no piracy of a pantomine, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama." (p. 55)

Judge Hand continued:

> "Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause may tell the audience more than words could tell. (p. 55)

Judge Hand emphasized that:

> "The play is the sequence of the confluents of all these means, bound together in an inseparable unity. . . ." (pp. 55-6)

We submit that "conduct" from HAIR, part of the "indivisible unity" of the musical and a fundamental means of its expression, cannot be judged separately. As explicated in *Miller*, the First Amendment requires that only the work as a whole, as an "inseparable unity", be judged for alleged "obscenity".

(ii) We need not belabor the point that plays and musicals are entitled to full protection under the First Amendment. Motion pictures are so protected, although hardly envisioned by Madison and his fellow draftsmen. But they were familiar with the stage and with the evils of censorship in this fundamental medium of expression.*

(iii) The conduct which the lower courts improperly tore from the musical for separate judgment primarily involved what the trial judge considered "*simulated* sexual conduct". (emphasis added). He equated this with the commission of an *actual* murder or other crime on the stage, as part of the play. But when Othello realistically *simulates* the strangling of Desdemona, on the stage of the Chattanooga auditorium, he cannot be convicted of murder, attempted murder or

* "In 1737, Henry Fielding, the greatest practicing dramatist, with the single exception of Shakespear, produced by England between the Middle Ages and the nineteenth century, devoted his genius to the task of exposing and destroying parliamentary corruption, then at its height. Walpole, unable to govern without corruption, promptly gagged the stage by a censorship which is at full force at the present moment." Bernard Shaw, Preface to PLAYS UNPLEASANT, Penguin Books, 1961; p. 14.

assault and battery. If a character *simulates* a sexual act on the stage, he is not guilty of violating statutes prohibiting *actual* sexual conduct in public. His conduct is as much dramatic "expression" as Othello's simulated act of murder, or any of the innumerable crimes of violence simulated on the stage in plays, musicals and operas.

(iv) As dissenting Judge Edwards noted, neither the trial judge, nor the advisory jury, nor the majority of the Court of Appeals saw the musical HAIR. It was therefore impossible for them to judge the play, including the conduct singled out by them, under constitutional standards. This Court held in *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, that expert testimony was not required of the prosecution, because the challenged works "obviously, are the best evidence of what they represent." A second-hand account of what an inexpert witness saw on the stage did not give the jury, trial judge or appellate judges sufficient basis for determining whether the "inseparable unity", the musical HAIR, actually did appeal to prurient interest, depict sexual conduct in a patently offensive way or lack serious value.

(v) Municipal auditoriums are a primary forum for the professional theatre in many cities of this country. It is therefore essential that their managers comply scrupulously with constitutionally acceptable standards in determining which plays shall or shall not be permitted access to audiences in these cities. We agree with plaintiff that "narrow, objective and definite standards" were not established or followed here. Without such standards, American playwrights and their audiences would suffer, in these cities, the same stifling censorship which afflicted the British theatre for over two hundred years.

CONCLUSION

It is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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